IN THE HIGH COURT OF JUDICATURE
ANDHRA PRADESH
AT HYDERABAD

THE HON'BLE SRI JUSTICE J.CHELAMESWAR
AND
THE HON'BLE SRI JUSTICE D.APPA RAO

Writ Petition No. 10061 of 2006

Between :

K.Manjusree ..
Petitioner

And

The State of AP represented by
Chief Secretary, Saifabad,
Hyderabad and another ..
Respondents

Writ Petition No. 10062 of 2006

Between :

M.Laxman ..
Petitioner

And

The State of AP represented by
Chief Secretary, Secretariat,
Saifabad,
Hyderabad and another ..
Respondents

Dated :

JUDGMENT : (per JC,J)

-

These two writ petitions are filed with the prayer as follows :

WP No.10061 of 2006 & WP No.10062 of 2006

"For the reasons stated in the accompanying affidavit, it is prayed that this Hon'ble Court may be pleased to issue an appropriate writ or order or direction, one in the nature of writ of mandamus,

(i) declaring the action of the respondent No.2 in enforcing the resolution dated 30.11.2004 of the Administrative Committee, prescribing minimum qualifying marks criteria, is in contravention of Article 233, violative of Art. 14 & 16, *ultra vires,* void and inoperative.

(ii) A direction may be issued to the respondent 2 to prepare a panel of names for the posts of District and Sessions Judge (Gr.II) pursuant to the notification dt. 29.5.2004 and make recommendations to the respondent-1,

without giving effect to the resolution dated 30.11.2004;

(iii) Costs be awarded to the petitioner,

and pass such other order or orders appropriate in the circumstances of the case.

The 1st respondent issued an advertisement dated 29.5.2004 in various newspapers inviting applications for appointment to the post of District and Sessions Judge Grade-II. According to the advertisement, ten posts are proposed to be filled up by Direct Recruitment. The advertisement also contained the details like the number of posts reserved for OC, BC, SC/ST, Woment etc. It was also indicated in the notification that the selection process contains a written examination and an interview.

The petitioners in these two writ petitions applied in response to the above mentioned notification. The fact that both the petitioners satisfy the basic eligibility criteria prescribed in the notification is not in dispute. Both of them appeared for the written examination held on 30.1.2005 and both of them were also called for the interview and they appeared for the interview. What transpired thereafter according to the petitioners perception is described in paras 7, 8 and 9 of the affidavit filed in support of WP No.10061 of 2006,

which read as under :

> "7. While the matter stood thus, after completion of written examination and oral interview and following the procedure, the Administrative Committee of the Hon'ble High Court have selected and prepared the list of following 10 candidates for the purpose of recommendation to the Respondent-1 for appointment to the post of District & Sessions Judge (Gr.II) on the basis of total marks obtained in Written Examination and Interview, by adopting the reservations.
>
> 1) Venkata Jyothirmayee
> 2) C.Sumalatha
> 3) K.Manjusree (petitioner)
> 4) A.Hari Haranatha Sarma
> 5) G.Anupama Chakravarthy
> 6) V.B.Nirmala Geethamba
> 7) M.Lakshman
> 8) BSV Prakash Kumar
> 9) MG Priyadarshani
> 10) N.Thukaramji
>
> A copy of the list of the candidates selected

along with marks obtained by them is filed herewith as Annexure P-4. I submit that the Administrative Committee has followed the earlier (2001-02) practice in selecting the candidates.

8. I further understand that the above list was placed before the Hon'ble Full Court for the purpose of approval and recommendation. At that stage, the list was reviewed and re-drawn after referring to the Committee of Hon'ble Judges, by fixing minimum qualifying marks in the interview. In result, in fixing the minimum qualifying marks in the interview, the candidates, namely Venkata Jyothirmayee who has got highest marks of 81.6 (first rank), K.Manjusree (myself) who has got marks of 79.1 (third rank) under the open category. G.Anupama Chakravarthy (BC-A) with 59.6 marks highest in the group and M.Lakshman (BC-D) highest in the group

with 67.2 marks and MG Priyadarshini (SC) with 56.4 marks were eliminated. Thus, 5 candidates out of 10 candidates, including myself, selected by the Administrative Committee on the basis of total marks in written test and interview were deleted from the list.

9. It is submitted that by prescribing minimum marks in the interview, second list (Annexure P-5) was prepared with 9 candidates and the same was recommended to the Respondent-1 for appointment to the posts of District & Sessions Judge (Gr.II). The same is under consideration of Respondent-1 and appointment orders may be issued at any time to the candidates listed in Annexure P-6."

In the counter affidavit filed by the High Court sworn to by Sri P.Durga Prasad, Registrar General on 8.6.2006 at para 9 and 10 it is stated as follows :

"9. With respect to the averments contained in paragraphs 7 and 8 of the affidavit, it is respectfully submitted that the selection process of the District and Sessions Judge

Grade II is not yet complete. The petitioner has given the names of ten persons who are allegedly selected by the High Court in the first instance on the basis of the total marks obtained in the written examination and interview and also some other minute details of the marks obtained by the candidates. It is submitted that the High Court has not published the marks obtained by the candidates in the written test and in the oral interview and the said information is confidential in nature. In the verification portion of the affidavit, the petitioner has not stated as to the source of such confidential information to her except stating that the information given is true to the best of her knowledge. Since the source of information has not been disclosed by the petitioner, the said information cannot be relied upon by her. The act of the petitioner in producing

such confidential information smacks of unfair practice adopted by her, which itself is sufficient to dismiss the writ petition and further warranting initiation of criminal action against the petitioner. This respondent reserves its right to initiate appropriate criminal action against the petitioner for such act.

10. With respect to the averments contained in para 9 of the affidavit, it is submitted that the selection process is not yet complete and so far there is no recommendation sent by the High Court to the Government for appointment of the candidates as District Judges, Grade II. Hence there is no merit in the contention of the petitioner."

Apart from the allegations and counter allegations extracted above, the fact remains that by the date of the hearing of the writ petitions, the High Court approved and recommended certain names for appointment as District and Sessions Judge Gr.II and the matter is pending in the government. In our view, it is not

very relevant to examine as to the source or basis of information upon which the affidavits are sworn to by the petitioners. What is at issue is the legality of the procedure adopted by this Court in making recommendations for the appointment of the post of District and Sessions Gr.II. Declining to examine legal issues raised by a citizen in such a matter where this Court plays a role on the administrative side in the decision making process would neither enhance the prestige of the court nor its credibility. Those two factors in our view are the ultimate foundation of this institution and every attempt is to be made to protect the same and in our view the only way of protecting it is making the decision making process as transparent as possible.

Under Article 233 of the Constitution, the appointments, postings, promotions of the District Judges in the State are required to be made by the Governor of the State in consultation with the High Court. The Governor of Andhra Pradesh made rules called `The Andhra Pradesh State Higher Judicial Service Rules' in exercise of the powers conferred under Article 233 and the provision to Article 309 read with Article 313 of the Constitution of India. Under the said rules§, the service is constituted consisting of District and Sessions Judge, Gr.I and II and various other posts enumerated under Category II of Rule 1. District and Sessions Judges, 2nd Grade fall under the category II of the service, the

appointment to which post is required to be made either by transfer from among the Senior Civil Judges in the State Judicial Service or by direct recruitment from the Bar. Under the proviso to sub-rule (2), 33 1/3% of the total number of posts shall be filled or reserved in favour of the direct recruits. While making such appointments in accordance with the above mentioned Higher Judicial Service Rules, by virtue of the mandate contained under Article 233, the State of Andhra Pradesh is obliged to consult the High Court and under sub-rule (2) of Article 233, only an Advocate recommended by the High Court shall be eligible to be appointed as a District Judge.

Obviously, the High Court requires some objective criteria for making recommendations for appointment to the posts of District Judges Gr.II. In order to establish such criteria, the High Court evolved a procedure which is described in the counter affidavit filed by the Registrar General of this Court at para 3 as follows :

> "3……So far as the selection process to the post of District Judge, Grade II by direct recruitment is concerned, it is submitted that the Administrative Committee of the High Court prescribes the selection process and other incidental procedures relating

> thereto, which will be subject to approval by the Full Court of the High Court. The practice which is being followed for selecting the District Judges Grade II by direct recruitment is that a Committee of Hon'ble Judges of the High Court evaluates the performance of the candidates both in the written examination and oral interview, and the Full Court of the High Court recommends their names to the State Government for appointment as District Judges, Grade-II."

Thus the High Court decided to hold an oral examination and an interview for the purpose of making the recommendations for filling up of posts of District Judges Grade II is not in dispute. The crux of the dispute is whether the High Court is legally right in prescribing a minimum qualifying mark to be obtained in *viva voce* examination while recommending the names of the candidates for appointment to the post of District Judges Gr.II. That such a system of qualifying mark was prescribed is not in dispute. At para 6 of the affidavit filed by the Registrar General, it is stated as follows :

"6……. It is in

this perspective that the High Court thought it fit to stipulate minimum qualifying marks not only for the written test but also for oral interview…."

Further it is stated at para 4 of the affidavit in this context as follows :

"4…….Further, the Administrative Committee of the High Court by its Resolution dated 30.11.2004 has decided to follow the procedure evolved for the recruitment to the post of District Judge Grade II by direct recruitment in the year 2002, whereunder minimum qualifying marks of 50%, 40% and 35% were prescribed for OCs, BCs and SCs/STs respectively in the written test as well as in the oral interview. Candidates who were qualified in the written test by getting qualifying marks of 50%, 40% and 35% for OC, BC and SC/ST respectively were called for interview….."

It is this decision of the High Court on its administrative

side which is the bone of contention in these two writ petitions.

Petitioners challenge such a decision of the High Court in prescribing a minimum qualifying mark on three grounds:

1) that the notification calling for the applications did not disclose the existence of such a rule prescribing the minimum qualifying mark and therefore there is a violation of the principles of natural justice; 2) that such a decision must exist as on the date of the notification, but cannot be taken subsequent to the notification and be made applicable to the selection process and (3) Lastly, such a decision must be taken by the entire body of the Judges of the High Court (popularly referred to as Full Court), but not by a Committee of the Judges.

To examine the three submissions made by the petitioners, the following undisputed facts must be kept in mind.

The notification calling for applications in the instant case was issued on 29.5.2004. The Resolution of the Administrative Committee to follow the procedure evolved for recruitment to the posts of District Judges Gr.II in the year 2002 for the selection process in question in these two writ petitions was taken on 30.11.2004. Such a decision of the Administrative Committee was not admittedly placed before the Full Court for its approval. The Full Court while considering the decision of the Administrative Committee to

recommend ten names of the successful candidates who appeared in the selection process incidentally took note of the existence of the Resolution of the Administrative Committee dated 30.11.2004 and did not disapprove the same.

We must state here that this question of lack of approval by the Full Court is not pleaded in the affidavit originally filed in support of the writ petition. Therefore, there was no categoric statement by the High Court in the counter affidavit in that behalf. However, in the reply affidavit at para 6 filed by the petitioners, the petitioners raise a doubt whether such a Resolution was approved by the Full Court or not. Therefore, we called for the concerned records of the Court and examined the factual position in the interest of transparency and justice and found the factual position as indicated above.

It is in the above mentioned factual background, various legal issues raised in these writ petitions are required to be examined.

The first submission of the petitioners is that the petitioners, for that matter, none of the candidates did have notice of the existence of such resolution as is in question. We must state here, as a matter of fact, the notification did not mention the requirement of any candidates securing the minimum qualifying mark either in the written examination or in the oral examination for being considered for recommendation by the High Court.

All that the notification specifies is that ***"a written examination followed by interview will be held for selection to the above posts."***

Interestingly, the petitioners do not have any grievance about the prescription of a minimum qualifying mark in the written examination, understandably because the petitioners secured the minimum qualifying marks in the written examination. The legality of the prescription of minimum qualifying mark either for a written examination or for a *viva voce* must depend on a neutral norm, but not on the grievance of the petitioners. According to the learned counsel for the petitioner, it is not the prescription *per se* of the minimum qualifying mark either in the written or oral examinations that is illegal, but the lack of notice of such a prescription to the candidates, which makes such prescription illegal. In support of the submission, the learned counsel relied upon the following judgments of the Supreme Court.

Harla v. The State of Rajasthan [1]

The Supreme Court was dealing of a convict under Jaipur Opium Act. He was prosecuted and punished under the above mentioned Act which was passed by the erstwhile ruler of Jaipur State. There was another law of the Jaipur State called Jaipur Laws Act, 1923. Section 3(b) of the said Act states that all the existing or future laws are required to be published in the

Official Gazette. As a matter of fact, the Supreme Court found that the Opium Act was not so published in the Official Gazette. It is in this context the Supreme Court held at para 8 as follows :

> "8. In the absence of any special law or custom, we are of opinion that it would be against the principles of natural justice to permit the subjects of a State to be punished or penalized by laws of which they had no knowledge and of which they could not even with the exercise of reasonable diligence have acquired any knowledge. Natural justice requires that before a law can become operative it must be promulgated or published. It must be broadcast in some recognizable way so that all men may know what it is; or, at the very least, there must be some special rule or regulation or customary channel by or through which such knowledge can be acquired with the exercise of due and reasonable diligence. The thought that a decision reached in the secret recesses of a chamber to which the public have no access and to which even their accredited representatives have no access and of which they can normally know nothing, can nevertheless affect their lives,

> liberty and property by the mere passing of a Resolution without anything more is abhorrent to civilized man. It shocks his conscience. In the absence therefore of any law, rule, regulation or custom, we hold that a law cannot come into being in this way. Promulgation or publication of some reasonable sort is essential."

The question was once again considered in **D.B.Raju v. H.J.Kantharaj**[2]**.** The election to the Legislative Council of Karnataka from the Chitradurga Constituency Local Authorities Constituency was in dispute. The concerned Zilla Parishad in exercise of the statutory power under the provisions of Karnataka Zilla Parishads, Taluk Panchayat Samithis, Mandal Panchayats and Nyaya Panchayats Act, 1983 nominated certain members to be included in the voters list for the above election. The question before the Supreme Court was whether such a nomination was made within the time prescribed under the law or not. The electoral roll was required to reflect the names of all the electors including the nominated electors. Nominations were made in the last minute in the said case. Consequentially, the electoral roll was to be corrected including the names of the nominated members. It is in this context, the Supreme Court framed the question at para 11 which is as follows :

> "11. …….as to whether the electoral roll will be deemed to have been modified when it was made public at 8.55 p.m. or earlier when the actual correction in the list was made in the Deputy Commissioner's office which fact was kept confidential in spite of repeated demands for information."

Repelling the submission that there was no statutory requirement of displaying the electoral roll and therefore the electoral roll takes effect from the time it is prepared, the Supreme Court held at para 13 as follows :

> "13. …… But that does not lead to the further conclusion that the electoral roll can be prepared secretly and kept in the drawers of the officer without any information or knowledge to persons who are interested in finding out its final shape. The reported case was dealing with the principle of subordinate legislation and in paragraph 15 of the judgment made important observations which support the respondents' point of view. It was stated thus : (SCC p. 672, para 15)
> "There can be no doubt about the proposition that where a law, whether Parliamentary or subordinate, demands compliance, those that are governed must be notified

> directly and reliably of the law and all changes and additions made to it by various processes. Whether law is viewed from the standpoint of the `conscientious good man' seeking to abide by the law or from the standpoint of Justice Holmes's `Unconscientious bad man' seeking to avoid the law, law must be known, that is to say, it must be so made that it can be known."
>
> It was further observed that unlike Parliamentary legislation which is publicly made, delegated or subordinate legislation is often made unobtrusively in the chambers of a minister, a Secretary to the government or other official dignitary and it was, therefore, necessary that subordinate legislation in order to take effect must be published or promulgated in some suitable manner whether such publication or promulgation is prescribed by the parent statute or not. It will then take effect from the date of such publication or promulgation…."

Thereafter the Supreme Court went on to consider the principle laid down in **Harla's case (supra)** and in **State of Maharasthra v. Mayer Hans George**[3] and finally came to the conclusion "having regard to the nature and purpose of the power for rectification of the

electoral roll by the Electoral Registration Officer, the principle enunciated in the abovementioned cases must be held to be applicable."

We are therefore of the view that the principle laid down in **Harla's case (supra)** need not necessarily be applicable to all situations. Essentially, the decision in **Harla's case (supra)** and the decisions of the Supreme Court which followed the same referred to the law whether parliamentary or subordinate which effect the rights and obligations of the citizens. It is in this context, the Supreme Court observed in **D.B.Raju's case (supra)** that the nature and purpose of such law that is to be kept in mind in applying the principle laid down in **Harla's case** and the other decisions of the Supreme Court which followed **Harla's case.**

The learned counsel for the petitioner also relied upon **State of Bihar v. Madan Mohan Singh**[4]**.** The case related to the selection of Additional District Judges. In accordance with the relevant law, 129 candidates were called for interview and 32 of them were selected and appointed. The question before the Supreme Court was whether the future vacancies could be filled up from amongst the remaining candidates who were called for the interview. The Supreme Court took note of the fact that the advertisement calling for applications to fill up the posts did not make any specific mention that the future vacancies are also to be filled up

from amongst the candidates who appeared for the selection process. The Supreme Court therefore held at para 7 as follows :

> "7. … particular advertisement and the consequent selection process were meant only to fill up 32 vacancies and not to fill up the other vacancies, the merit list prepared on the basis of the written test as well as the viva voce will hold good only for the purpose of filling up those 32 vacancies and no further because the said process of selection for those 32 vacancies got exhausted and came to an end. If the same list has to be kept subsisting for the purpose of filling up other vacancies also that ***would naturally amount to deprivation of rights of other candidates who would have become eligible subsequent to the said advertisement*** and selection process."

From the above extract, we are of the humble opinion that the Supreme Court in the above mentioned case did not lay down the principle that the non mention of the fact that future vacancies other than the notified would also be filled up from out of the candidates to participate in the selection process that would render the process, but, it is the deprivation of the opportunity to those candidates who would become

eligible by the date of the occurring of the future vacancy that vitiates the process adopted in the said case. In our opinion, this decision has no relevance to the issue on hand.

The principles of law that can be culled out from the series of decisions commencing from **Harla's case to D.B.Raju's case (supra);**

(i) That a law made by the State effecting either the life, liberty or property of a citizen (subject) is required to be made known by some known form of publication. In other words, the subjects must have some reasonable access to information regarding the laws which effect their lives, liberty and property. The line of decisions referred to above apply the same principle either to a law made by a Parliamentary body or a subordinate legislation. Though the form of publication contemplated by these decisions is not a rigid one and may vary depending upon the language of a particular enactment dealing with the mode of publication or a custom followed in that regard. In substance, the Supreme Court laid down that promulgation or publication of some reasonable sort is essential. Obviously, what is promulgation or publication of some reasonable sort is required to be decided in a given case depending on the facts and circumstances and the legal environment governing the situation.

Whether the principle laid down by the

Supreme Court in the said decisions in the context of a law made by the State providing for either a punishment for the violation of the provisions of the law or affecting some right of the subject is also applicable to the criterion adopted by the High Court such as the one in question before us is a question which requires a further examination.

The examination of this question necessarily involves the examination of the concept of law and whether the stipulation such as the one impugned herein is law falling within the teeth of the principle laid down in the series of cases starting from **Harla's case**. ***Dias on Jurisprudence*** (4th Edition) on an analysis of the various theories of the concept of law summarises as follows:

> "***The key to understanding a law properly so called lies in duty,*** which is created by the command of a sovereign. A command consists of "the expression or intimation of your wish" that another shall do or forbear, coupled with the power and purpose of inflicting an evil (sanction) in the event of disobedience. A law, therefore, is a command of sovereign backed by a sanction. Duty and sanction are correlative terms, the fear of sanction supplying the motive for obedience".

Looked at this angle, the impugned stipulation of prescribing a minimum qualifying mark in the *viva voce* examination for selection of a candidate to the post of the judicial office, in our view, cannot be called a law which requires a prior publication thereby putting the applicants for such posts on notice of such a stipulation. We say so not because that the High Court which made the impugned stipulation is not the Sovereign. Undoubtedly, under a constitutional government, judiciary headed by the superior constitutional courts shares a part of the sovereign authority with the other coordinate branches – Legislature and Executive of the State. Under the Indian Constitution, the ultimate sovereign are the people who invested the various branches of the constitutional government with the sovereignty with well defined limitations. In that sense, the impugned stipulation is a command of the sovereign. But that does not by itself make the command law. The command to be called a law must be such a command directing the subject to do or forbear from any act that by creating a duty the disobedience of which is visited with a sanction. The performance of an obligation or forbearance from indulging in an act prohibited by the command of the sovereign does not leave any option to the subject. The subject disobeys the command only at the risk of the inevitable infliction of the sanction.

Rules or regulations dealing with the

conduct of examinations either for an academic qualification or for the purpose of assessing the suitability of a candidate to a public office are not of the same quality. They do not create any duty. Such examinations are the modes of assessment of the ability and suitability of the candidates. No subject has a duty to appear for such examination and failure at such an examination is not visited with any sanction. When such an examination is held for the purpose of deciding the ability and suitability of the candidate to hold a public office under the constitutional government, no doubt the examination is required to be conducted objectively with the avowed purpose of identifying the best among the competing candidates. No doubt failure at such an examination would deprive the unsuccessful candidate of the opportunity to secure an appointment to a public office. It does not in any way effect any of the rights of such unsuccessful candidates. In the context of appointment to a public office, it is the settled principle of law that nobody has a right to seek an appointment. The only right available under the constitution is the right to compete along with other eligible candidates. The State has a legal obligation to apply uniform yardstick in deciding the suitability of the candidates. By not notifying the various parameters by which the assessment would be made in our view does not put the candidates to any disadvantage so long as the same parameters are

applied to all the candidates belonging to the same class.

Success in such a examination depends upon the accomplishment of the candidate. Such accomplishment is not achieved in a short span of fortnight or a month or two as the time gap between the date of the advertisement and the examination. More particularly the purpose of a *viva voce* examination in the context of selection to a judicial office is held to be to assess the overall intellectual and personal qualities like alertness, resourcefulness, dependability, capacity for discussion, ability to take decisions, qualities of leadership etc. which are also essential for a judicial officer. [**See para 55 of (2006) 6 SCC 395].** If that is the purpose of a *viva voce* examination, those various qualities or attributes are incapable of being achieved in a short span of a few weeks or months for a candidate seeking a judicial office to complain that if only he had been put on notice of the existence of a minimum qualifying mark in the *viva voce* examination he would have acquired those attributes in such limited span of time.

Any examination process involves an assessment of either the accomplishment or the personality of the candidate sometimes even both depending upon the purpose of the examination.

We therefore are of the opinion that the non specification of the minimum qualifying mark at the *viva voce* examination in the notification calling for the

applications is in any way violative of principles of natural justice. The submission is therefore rejected.

The next submission is that the decision to prescribe a minimum qualifying mark must be approved by the Full Court. In the absence of any approval by the Full Court such a decision is not a decision of the High Court and consequently there is a non-compliance with the provisions of Article 233(1) of the Constitution of India. An ancillary submission in this regard is that that such a decision must exist on the date of the notification.

No doubt, Article 233 mandates the Governor of the State to consult the High Court while making appointments of persons to be District Judges. By a catena of decisions, the Supreme Court repeatedly held that such a requirement is mandatory, the consultation must be real, full and effective. See **State of Kerala v. A.Lakshmikutty**[5] **at para 22.** The said decision was quoted with approval subsequently in **State of Bihar v. Bal Mukund Sah**[6] **at para 35.** A larger Bench of the Supreme Court in **S.C. Advocates-on-Record Assn. V. Union of India**[7] **at para 281** held that the consultation contemplated under Article 233 ***"…. is with the entire body of Judges constituting the High Court and not with a single individual like the Chief Justice of a High Court….."*.** It is in discharge of the constitutional obligation under Article 233 of making an

appropriate recommendation to the Governors in the matter of appointment of the District Judges, the High Court undertook the responsibility of identifying the suitable candidates. In order to ensure such an identification process is more rational and objective, the High Court decided to call for applications from all those candidates who have the basic eligibility to be appointed. Since there are bound to be large number of candidates answering the basic eligibility criteria necessarily it involves a process of selection of the best among them. Its for this purpose the High Court deviced the procedure of conducting a written examination obviously to assess the relative academic strengths of the competing candidates and a *viva voce* examination to assess the suitability to hold a judicial office. These are the various steps involved in the identification process of the suitable candidates to enable the High Court to make appropriate recommendation to the Governor. When Article 233 requires the High Court to be consulted by the Governor. In our view the consultation with the entire body of the High Court as pointed out by the Supreme Court must be understood as regards the final recommendation made by the High Court, but not every step that precedes the recommendation of the High Court in the process of identification of the suitable candidates as required to be taken by the Full Court. In our view, such an interpretation of Article 233 would lead to unnecessary burden on the Full Court as it was pointed

by the Supreme Court in **State of U.P. v. Batuk Deo Pati Tripathi**[8] in the context of the power of the High Court under Article 235 as follows :

> "…But though the control over subordinate courts is vested institutionally in the High Courts by Article 235, it does not follow that the High Courts have no power to prescribe the manner in which that control may in practice be exercised…."

The Supreme Court in **High Court of Judicature for Rajasthan v. P.P.Singh**[9] at para 19 held as follows :

> "19. It is also true that the powers of the Chief Justice under Articles 235 and 229 of the Constitution of India are different and distinct. Whereas control over the subordinate courts vests in the High Court as a whole, the control over the High Court vests in the Chief Justices only. (See **All India Judges' Assn. V. Union of India – (1992) 1 SCC 119).** However, the same does not mean that a Full Court cannot authorize the Chief Justice in respect of

> any matter whatsoever. In relation to certain matters keeping the rest of it in itself by the Full Court, authorization to act on its behalf in favour of the Chief Justice on a Committee of Judges is permissible in law. How far and to what extent such power has been or can be delegated would be discernible only from the Rules. Such a power by the Full Court can also be exercised from time to time."

This principle of delegation by the Full Court was approved by a Seven Judge Bench of the Supreme Court in **State of U.P. v. Batuk Deo Pati Tripathi (supra),** was reiterated by the Supreme Court in **Nawal Singh v. State of U.P.**[10]

The principle of delegation approved in the context of the exercise of power by the High Court under Article 235 in our view applies to the context of Article 233 also. We do not see any qualitative difference in the nature of the power under either of the above mentioned Articles.

It is brought to our notice by the learned Standing Counsel appearing for the High Court that the Full Court on the 12th day of June, 1974 passed a

resolution authorizing the Chief Justice to constitute Committees for the convenient administration, to deal with several subjects and also to reconstituted them as and when he deems it necessary and the resolution still continues to be in force and not disapproved at any later point of time by the Full Court. In exercise of the power conferred under the above resolution, the Chief Justice for the time being constitutes Committees. The subject of recruitment of District Judges either by Direct Recruitment or by Transfer is required to be dealt by the Administrative Committee. As already noticed from the counter (extracted earlier), the Administrative Committee prescribed the selection process and other incidental procedure relating thereto for identifying the names after following the prescribed procedure are placed before the Full Court and on an approval by the Full Court those names are recommended to the Government. In exercise of such power, the Administrative Committee by its Resolution dated 30.11.2004, decided to follow the procedure involved for the recruitment of the posts of District Judges Grade II by direct recruitment for the year 2002. It is brought to our notice for the purpose of the above mentioned recruitment held in the year 2002, the Administrative Committee passed a Resolution prescribing the minimum qualifying marks both for the written and the *viva voce* examination dated 24.7.2001 which was approved by the Full Court on 16.8.2001. Afterwards the examination was held on 8.9.2001, the

Administrative Committee identified the suitable candidates on 21.2.2002 which identification was approved by the Full Court on 6.3.2002. Though it was a decision taken for the purpose only for that recruitment conducted in the year 2002, in the context of the impugned selection process, the Administrative Committee by its Resolution dated 30.11.2004 decided to adopt the same procedure for the impugned selection also. Admittedly, in the context of the impugned selection process, the resolution was not initially placed before the Full Court, but the fact that the earlier practice was adopted by the Administrative Committee by the Resolution dated 30.11.2004 was brought to the notice of the Full Court eventually when the names identified by the Administrative Committee were placed before the Full Court and the Full Court approved the said procedure.

In our view, if the Administrative Committee is a delegate of the powers of the Full Court, the fact that the Full Court did not disapprove the procedure adopted by the Administrative Committee would tantamount to approval of the procedure. There is nothing either under Article 233 or any other law which requires that such a decision of the Administrative Committee must be forth with approved by the Full Court even before the decision is implemented. At any rate nothing is brought to our notice by the petitioners to the contra. By virtue of the delegation of powers made by the Full Court, the

Administrative Committee evolved the procedure to be followed in identifying the suitable candidates to be appointed as District Judges Gr. II conducted the examination and placed the details of the procedure followed by the Administrative Committee and also the names of the candidates who are found successful in the selection process conducted pursuant to the norms laid down by the Administrative Committee were placed before the Full Court. It is always open to the Full Court either to decline approving the procedure adopted by the Administrative Committee or anyone or all the names of the candidates who are found to be successful in the selection process. The fact that the Full Court did not disapprove either the procedure devised by the Administrative Committee or the names of the candidates who were found successful in our view clearly indicates that the Full Court approved the selection process as well as the names of the candidates found successful in such process.

We are left with the last and ancillary submission in this regard. Whether the decision to prescribe a minimum qualifying mark in both the written and *viva voce* examination to fill up the posts of District Judges Gr. II should exist on the date of the notification calling for the applications

The undisputed fact is that the decision to prescribe a minimum qualifying mark both at the written and *viva voce* examination did not exist by the date of the

notification. But such a decision was taken by the Administrative Committee on 30.11.2004 i.e., a month prior to the date of the written examination and much prior to the *viva voce* examination.

The learned counsel for the petitioners argued that that absence of such a decision on the date of the notification would lead to a situation whether such decisions could be taken to achieve the "desired result" and therefore such a procedure would be arbitrary and violative of Article 14 of the Constitution of India.

The submission cannot be brushed aside lightly. If such a decision were to be taken in the last minute after the entire process of examination both written and *viva voce* is completed, it is possible that such an exercise of power would enable the authority making such prescriptions to manipulate results.

The legality of the procedure of prescribing a minimum qualifying mark at the *viva voce* examination fell for the consideration of the Supreme Court in **State of Maharashtra v. Husen**[11]**.** The Supreme Court held that prescription *per se* is not unconstitutional and it has a purpose. At para 9 it is held as follows :

> "…..We, however, cannot agree with the High court when it says that compulsory minimum passing marks for a viva voce test cannot be permissible in law. The high court

overlooked the fact that the viva voce test has relevance in regard to the factors other than those which are taken care of by the written test. Much would depend on the nature of service but it cannot be said that prescription of minimum marks for passing the viva voce test would always be constitutionally unsustainable. The performance of a candidate besides his knowledge in the academic field etc. also has relevance depending on the nature of the service or the duties and functions that he would be required to discharge from time to time. Take for example a service where it becomes necessary to test the reaction of the candidate in his dealings with the public. Next, whether he maintains his calm in panic situations or reacts sharply without weighing the situation confronting him. In such a service it is not enough that he has fairly good knowledge regarding the rules, the law and administrative requirements but it is

> equally important to see how he reacts in certain situations. We do not propose to multiply illustrations but it is sufficient to say that the viva voce test is as important as a written test and prescription of minimum pass marks will not per se make a rule unconstitutional. His performance both at the written test and the oral test would give the selector an integrated idea of the candidate's personality….."

The question is whether such prescription should really exist on the date the selection process commenced. We have already noted above, that there is a possibility of such prescriptions for the purpose of manipulating the results. But, it all depends on the facts and circumstances of the case. In the instant case, the decision to prescribe the minimum qualifying marks both for the written and *viva voce* examinations were taken much before the examination process commenced at which point of time, there cannot be any scope for the manipulation of the results.

In the circumstances, we do not see any merit in this submission also.

For all the above mentioned reasons, we see no substance in these writ petitions and therefore

they are dismissed.

(J.CHELAMESWAR, J)

knk **(D.APPARAO, J)**

30th October, 2006

§ **Rule 2 : Appointment :-** (a) Appointment to Category I shall be made by promotion from Category II and appointment to Category II shall be made :-

(i) by transfer from among :

Senior Civil Judges in the Andhra Pradesh State Judicial Service; or in the Hyderabad State Judicial Service; and

(ii) by direct recruitment from the Bar :

Provided that 33 1/3% of the total number of permanent posts shall be filled or reserved to be filled by direct recruitment.

Explanation :- In the determination of 33 1/3% of the total number of permanent posts, fractions exceeding one-half shall be counted as one and other fractions shall be disregarded.

(b) All promotions shall be made on grounds of merit and ability, seniority being considered only when merit and ability are approximately equal.

[1] AIR 1951 SC 467

[2] (1990) 4 SCC 178

[3] AIR 1955 SC 722

[4] 1994 Supp (3) SCC 308

[5] (1986) 4 SCC 632

[6] (2000) 4 SCC 640

[7] (1993) 4 SCC 441

[8] (1978) 2 SCC 102

[9] (2003) 4 SCC 239

[10] (2003) 8 SCC 117

[11] 1994 Supp (1) SCC 468